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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

Nos. 48 and 64

UNIVERSAL OIL PRODUCTS COMPANY,
Petitioner,

vs.

ROOT REFINING COMPANY,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF ON BEHALF OF PETITIONER, UNIVERSAL OIL PRODUCTS COMPANY

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PRELIMINARY STATEMENT

Amici Curiae, by their brief, have attempted to create much confusion as to the fundamental issues involved and as to petitioner's basic contentions here.

A brief summary of the facts upon which petitioner bases its contentions will demonstrate the inapplicability of most of the legal principles enunciated by *Amici*.

When the attorneys, who are now *Amici Curiae*, first appeared before the Court of Appeals and suggested that there might be some impropriety in the judgments of that

court rendered in the *Root* case, counsel for petitioner immediately offered to consent to the vacating of those judgments and to the reargument of the causes. This offer was not made because of any consciousness of guilt, but because petitioner did not desire to have the benefit of any judgment against which there might be directed even a suggestion of fraud (C. R. p. 57, 67; Tr. v. I, p. 18-9, 27). The challenged judgments would thus have been at once "devitalized"—a fate which this Court has very properly held* should overtake a "tainted" judgment.

Although the rights of Root under the very favorable settlement which it had made with petitioner were fully protected by this offer of petitioner (P.B. 12-3)**, the offer was not accepted. The Court of Appeals thereupon appointed a Master, not, as *Amici* would have this Court believe (Br. 9)***, "to conduct hearings in accordance with regular judicial procedure", but to carry on an investigation pursuant to inquisitorial and investigatory powers of the broadest scope. Indeed, the order appointing the Master (C.R. p. 137-9; Tr. v. I, p. 94-6) specifically vested him "with authority to *examine, investigate* * * * [and] to *request the Department of Justice to make available to him*† as an officer of this court the records, documents and other evidence in the possession of such Department", including such things as F. B. I. reports and grand jury proceedings, not available to petitioner. That the court intended, in fact, merely to have an investigation of its own probity is

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*Hazel-Atlas Co. v. Hartford Co., 322 U. S. 238.

**References to pages of petitioner's main brief are indicated as "P.B.—".

***References to brief of *Amici Curiae* are indicated as "Br.—".

†All italics ours unless otherwise indicated.

indicated by the colloquy preceding the entry of this order. Counsel for petitioner at the hearing said (C.R. p. 50; Tr. v. I, p. 12):

> "Now, Your Honors will say, 'Well, what can we do about it?' And that is not an easy question to answer.
>
> "So far as the legal questions about the present situation of the Root case and what Your Honors will think proper to do with the former opinions of this Court, so far as those are concerned, Your Honors will do what you think best about that. So far as the other matter is concerned, Your Honors may think that in the interest of its own judicial integrity you should make some further inquiry.
>
> "I don't know of any precedent for appointing a master to make such an inquiry, but I don't suppose that a Court of great powers is without power to proceed in any proper way to *investigate anything it thinks ought to be investigated affecting its own standing for integrity.*
>
> "Further than that, we feel such an interest that we will be glad to make such an inquiry if we can. Following the usual rule, and a very proper one, we understand that the Government will not give us any information whatever about facts that it has collected. That is their practice, and I suppose that is right as a matter of public policy."

Judge Denison, speaking for the attorneys who are now *Amici*, at the same time said (C.R. p. 51; Tr. v. I, p. 13):

> "I think Your Honors have the inherent power of any self-respecting court of general jurisdiction to direct that there be conducted in any manner thought proper an investigation at your instance, for the protection or vindication, as the case might be.

of *the reputation of the Court to the extent that it was involved.*"

As we have heretofore shown (P.B. 16-21, 38-46), the Master, in exercising this authority, consciously did so in a manner consonant only with an investigation and without regard to "regular judicial procedure".

Petitioner recognized that the Master was conducting an "investigation" rather than a trial and, as long as the investigation was not utilized to achieve improper results *qua* petitioner, it had no objection. Indeed, early in the proceeding, petitioner advised the Master that it welcomed such an investigation and would cooperate with the Master in the furtherance thereof (C.R. p. 164-5; Tr. v. I. p. 121-2). Petitioner at the same time took the position that the investigation in no way constituted a justiciable "case" or "controversy" and could in no way affect the property rights of petitioner (*ibid.*). To this the Master apparently agreed (C.R. p. 177; Tr. v. I. p. 133); and the entire investigation was thereafter conducted by him and *Amici* with the understanding that all evidence adduced and all steps taken were subject to petitioner's contention in this regard (Tr. v. I, p. 250).

At the conclusion of the investigation the Master found that the judgments of the Circuit Court of Appeals in the *Root* case were tainted with fraud. Needless to say, petitioner excepted to this conclusion and still contends that in a trial where the ordinary requirements of due process of law were observed, no such conclusion could have been reached.

It is true, as *Amici* state (Br. 10), that petitioner did not file an objection to the Master's Report on the ground

of lack of due process in his proceedings. Such an objection at that time would not only have been inapposite, but would have been inconsistent with the assumption of all parties that the Master was only conducting an investigation by which no property rights of the petitioner could be affected. No occasion arose to complain of lack of due process until the *Amici* and the court below sought to utilize the Master's Report as if it constituted a decision in a "case" or "controversy" upon the basis of which adjudications binding upon petitioner could be made.

The Court of Appeals, by its order dated June 15, 1944, accepted the result of the Master's investigation, vacated its judgments in the *Root* case, recalled its mandates and ordered a reargument of the causes.

As the only action taken at that time by the Court of Appeals on the basis of the Master's findings was that to which petitioner had offered to consent at the outset, there was nothing from which a review could be sought—even if an order directing reargument would have otherwise been subject to review by this Court.

The Court of Appeals did not change this status until, on petition of *Amici Curiae*, it entered the order of December 29, 1944, now under review. By that order, the Court of Appeals for the first time invested the proceedings conducted by the Master with the attributes of a judicial trial, and as a consequence entered what was, in effect, a money judgment against petitioner. Thus, as a result of the entry of this order, the investigation culminated in a judgment affecting the property rights of the petitioner.

Apparently it has at all times been the intention of the *Amici* to avail themselves of the investigation con-

ducted by the Master for the purpose of obtaining a binding adjudication charging the petitioner with fraud. *Amici* now state (Br. 62) that the proceedings leading to the Master's investigation were initiated by them for the purpose of obtaining a determination binding upon the petitioner and for the benefit of their clients who had not appeared in the investigation at all.

It was only after the order of December 29, 1944, had been entered that the petitioner had cause to ask for a review of the proceedings had in the course of the investigation, for it was not until that order was entered that the latent intention of *Amici* was translated into judicial action utilizing the results of the investigation as if there had been a trial which could be the basis of a valid judgment against the petitioner.

STATEMENT AS TO THE ALLEGED NATURE OF THE FRAUD

Petitioner, in its main brief, confined its argument to the lack of jurisdiction of the Court of Appeals and the deprivation of its property by that court without due process of law. *Amici Curiae*, on the other hand, bottom their position upon an assumption that petitioner has, in a legally cognizable proceeding conducted in accordance with due process of law, been found guilty of the crime of bribing Judge Davis (Br. 5, 18-9, 60). Even the report of the Master rendered after his investigation does not support so bald an assumption. In this connection *Amici Curiae* requested the Master to conclude that (C. R. p. 311; Tr. v. VIII, p. 3571):

> "Universal Oil Products Company, through its agent Morgan S. Kaufman, by means of a bribe

corruptly influenced Judge J. Warren Davis as a member of the Court of Appeals for the Third Circuit in the case entitled *'Root Refining Company, Appellant, v. Universal Oil Products Company, Appellee,'* Appeal Nos. 5546 and 5648, pending in that court, and the decision prepared and filed by the said Judge Davis in said case was in fact rendered by Davis pursuant to his understanding that he would be paid a bribe by Universal Oil Products Company if his decision was favorable to said company."

It is significant that the Master refused to make this conclusion although he stated that he had found in the body of his report that at the time when Judge Davis voted for affirmation in the *Root* case he knew "or at least expected that if the decision was favorable to Universal, he would receive some monetary compensation from *Kaufman*" (*ibid.*). Whatever conclusion as to the iniquitous association between Davis and Kaufman the Master may have drawn from the documents in the possession of the United States Attorney,* there is no evidence in this record from which he would have been warranted in finding that Judge Davis knew prior to his decision in the *Root* case that Morgan Kaufman was counsel for or had been retained by petitioner. Indeed, all of the direct evidence was to the contrary.

The Master's refusal to believe the direct evidence of Davis and Kaufman on this issue undoubtedly was dic-

*This official had prepared and conducted the criminal trial of Judge Davis, Kaufman and William Fox, involving an alleged conspiracy solely between those three parties to obstruct justice in the personal bankruptcy of William Fox, which took place a year after the decision in the *Root* case.

tated by his knowledge of the sordid details exposed in those records which he had examined in the office of the United States Attorney but which he did not make a part of the record in the present proceedings because of their obvious immateriality.

Certainly there was no direct evidence or circumstantial evidence from which a trier of the facts in a properly conducted judicial proceeding could have found that Universal retained Kaufman for the purpose of bribing Judge Davis or instructed him to do so. Indeed, as to the Stokley loan by Kaufman, which constituted the alleged bribery of Judge Davis, the Master specifically found that "No officer, agent, employee or attorney of Universal in any way expressly or inferentially authorized, directed, suggested or approved" this loan or "had any knowledge of Kaufman's loan to Stokley at the time it was made" (C. R. p. 332-3; Tr. v. VIII, p. 3590-1).* In fact, the loan to Stokley was made months after the decision of the Circuit Court of Appeals in the *Root* case at a time when, as the Master found, Kaufman was counsel of record in that court in at least two pending cases with which Universal had no connection. Both of those cases were decided in favor of Kaufman's client, with Judge Davis writing the opinions and Judge Thompson dissenting in each case. Both cases were ultimately reversed; one by this Court and the other by the Court of Appeals in affirming a contrary holding by the District Court after retrial (C. R. p. 334; Tr. v. VIII, p. 3592). We do not debate the matter of petitioner's guilt further for we believe enough is shown on the face of the Master's findings to indicate that, in a litigation conducted

*Of course, Kaufman himself knew about this loan and the Master qualified the above quoted findings with that proviso.

according to the standards of due process of law heretofore insisted upon by this Court; a very different result would be reached.

POINT I

SINCE THE ORDER OF DECEMBER 29, 1944, IS BASED UPON THE PROCEEDINGS CULMINATING IN THE ORDER OF JUNE 15, 1944, A REVIEW OF THE FORMER ORDER NECESSARILY INVOLVES THE LEGALITY AND VALIDITY OF THE ORDER OF JUNE 15, 1944, AND THE PROCEEDING UPON WHICH IT WAS BASED (Answering Point I, Br. 23-6).

Whatever basis there may be for the order of December 29, 1944, must be found in the order of June 15, 1944, adopting the report of the Master. If the Court of Appeals might not properly utilize the report of the Master adopted by the order of June 15, 1944, for the purpose of affecting property rights of the petitioner, then the order of December 29, 1944, must fall. *Amici* concede that petitioner is now entitled to challenge the jurisdiction of the court "to act at all in the matter of the fraud" and that this lack of jurisdiction "if established, would nullify the June 15th order" (Br. 24), but it is their contention that this review may not deal with supposed errors of judgment in choice of procedure by the Master in the course of his investigation (*ibid.*).

They base this argument upon the contention that the order of June 15, 1944, "left nothing for future determination on the issue of fraud. On that issue it was final" (Br. 23). This contention begs the question and does not meet the argument which we have made.

While the Master's report and the order may have been final to conclude the investigation, it is our contention that neither the Master's report nor the order of June 15, 1944, were determinative against this petitioner on any issue in the sense that a judgment after trial determines the rights of the parties to a litigation. The results of an investigation, in which fundamental principles of due process of law were disregarded, may not be made the basis of an order affecting the property rights of the petitioner. This is precisely what the order of December 29, 1944, has sought to do.

The order of June 15, 1944, while approving the report of the Master in his investigation, predicated no judicial action thereupon except to vacate the *Root* judgments, and to order the reargument of the *Root* case, to which petitioner had previously consented. Up to this time, accordingly, no rights of petitioner were affected without its consent and without due process of law. As long as the consequences of the Master's investigation were confined to a proper scope, petitioner had no basis for complaint by reason of lack of due process, although it did disagree with the conclusions reached by the Master. Indeed, there was no legal requirement that the Master's investigation be conducted in accordance with the fundamental concepts of due process of law.

Only if *Amici* are correct in their present contention that the investigation by the Master should have the effect of a trial and that his conclusion, as adopted by the court below, may form the basis of a judgment against petitioner do questions of due process of law arise. Their contention on this score first received judicial sanction in the order of December 29, 1944. The petitions for *certiorari* were then promptly presented to this Court seeking review of the first

order in this proceeding aggrieving the petitioner in a legal, rather than in a moral, sense. If this review necessarily involves a determination of the validity of the order, dated June 15, 1944, that is no reason for denying the relief to which petitioner is undoubtedly entitled as to the order, dated December 29, 1944. See *Rorick* v. *Devon Syndicate*, 307 U. S. 299; *cf. Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U. S. 251.

The cases relied on by *Amici* do not weaken this conclusion. In *Toledo Co.* v. *Computing Co.*, 261 U. S. 399, *Turner* v. *Farmers' Loan and Trust Co.*, 106 U. S. 552, *Terry* v. *Sharon*, 131 U. S. 40 and *Trust Co.* v. *Grant Locomotive Works*, 135 U. S. 207, the parties aggrieved by judicial decrees affecting their property or other rights failed to appeal or obtain *certiorari*. Thereafter, either in an entirely separate litigation or in connection with the adjudication of different and independent questions, they sought to obtain review of the decrees which had originally aggrieved them. In none of these cases did the entry of the subsequent decree in any way change the effect of the prior decree by which the appellant was aggrieved. The adverse legal effect upon his rights was complete on the entry of the first decree without regard to the validity of the later decree. But here, as we have shown above, neither the investigation of the Master nor the entry of the June 15th order affected the petitioner's property rights until the order of December 29th was made.

Nor are the cases* holding that a judgment by a court having jurisdiction cannot be made the subject of collateral

**Roller* v. *Murray*, 234 U. S. 738; *Briscoe* v. *Dist. of Columbia*, 221 U. S. 547; *Insley* v. *United States*, 150 U. S. 512; *White* v. *Croze*, 140 U. S. 183; *Cooper* v. *Reynolds*, 10 Wall. 308; *Parker Bros.* v. *Fagan*, 5 Cir., 68 F. (2d) 616; *Bohenik* v. *Delaware & Hudson Co.*, 2 Cir., 49 F. (2d) 722.

attack in a separate suit of any avail to *Amici*. Petitioner is here seeking a review of the very proceeding which has deprived it of property without due process of law. There is no collateral attack.

Finally, *Amici* cite cases* holding that mere incidental errors of practice or errors dealing with the admissibility of evidence do not constitute a deprivation of due process of law. These cases have no materiality here, for the lack of due process charged goes to the fundamental conduct of the Master's investigation and not merely to errors of judgment. As we have seen, the Master searched freely among the documents portraying the Davis-Kaufman-Fox frauds. This search was made *ex parte* and prior to the time when *Amici* adduced any evidence before the Master. Furthermore, we have seen that the Master himself characterized the proceeding which he was conducting as an "investigation", to which the rules of evidence did not apply except in so far as he chose to make them applicable. Under these circumstances, the investigation conducted by the Master, from the very beginning, lacked the fundamentals necessary to constitute the type of trial required by the due process clause of the Constitution and the decisions of this Court thereunder.

Market Street Co. v. Comm'n, 324 U. S. 548.; *Corrigan v. Buckley*, 271 U. S. 323; *Stephenson v. Kirtley*, 269 U. S. 163; *Jones v. Buffalo Creek Coal Co.*, 245 U. S. 328; *Central Land Company v. Laidley*, 159 U. S. 103; *Western Chem. Co. v. United States*, 271 U. S. 268; *Tagg Bros. v. United States*, 280 U. S. 420.

POINT II

IN SO FAR AS THESE PROCEEDINGS ARE USED AS A BASIS FOR THE ENTRY OF A BINDING ADJUDICATION AGAINST PETITIONER, THE CONDUCT OF THE MASTER THEREIN CONSTITUTED A DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW (Answering Point II, Br. 26-36).

Amici Curiae apparently do not dispute that due process of law in a legal proceeding requires the trier of the facts to base his determination upon legal evidence properly offered and received and made available to petitioner. Their principal argument is that the Master, in the discharge of his duties, observed these requirements and did nothing which resulted in any prejudice to petitioner.

There is no substantial dispute as to what the Master did. *Amici* concede that the Master considered "a great mass of papers and many exhibits" which were in the possession of the United States Attorney and "borrowed" those "which he considered material", and that those which he "borrowed" and submitted for the examination of counsel for petitioner did not constitute all of the material which he examined. Their position is, however, that petitioner "cannot assume that the Master saw documents helpful to its side of the fraud issue and deliberately chose not to produce them, or that he saw other documents harmful to petitioner which he noted but did not produce, and upon which he based his findings" (Br. 26).

Counsel for petitioner have no way of knowing exactly what the Master did examine. We do know that he spent several days examining all of the documents, records, grand jury minutes; F.B.I. reports, notes for cross-examination

and papers of a like nature in the possession of the United States Attorney who had assembled these papers in furtherance of his prosecution of Judge Davis, Kaufman and Fox, who were charged with an alleged illegal conspiracy to obstruct justice, to which petitioner is not claimed to have been a party. While the Master may have thought that many of these papers were immaterial, and indeed inadmissible in a true legal sense in any proceeding involving petitioner, they undoubtedly made an indelible impression upon him which he could not erase from his mind when he came to consider the facts contained in this record. What effect this did or did not have upon his reasoning, petitioner is not required to determine, for, as this Court said in *Hazel-Atlas Co. v. Hartford Co.*, 322 U. S. 238, 247, it is "wholly impossible accurately to appraise the influence" which such improper evidence may have upon the judicial mind. If we are to make any assumption, it would be that the influence of this evidence may explain many of the unwarranted inferences which the Master, in the absence of any direct testimony, or in utter disregard thereof, drew from coincidences of fact at least as consistent with innocence upon the part of petitioner as with the Master's hypothesis.

Amici, in an attempt to justify the method adopted by the Master in the investigation, have distorted the record. For example, they quote the Master as stating that "Counsel on both sides, as I understand it, have examined all *this material* to the extent which they care to do so at this time" (Br. 14). This "material" did not include everything which the Master had examined, but only that part of the material which he deemed to be of sufficient materiality, in the accepted sense, to warrant an inspection by counsel for petitioner. The inspection by petitioner of certain selected portions of

those records and extracts of other portions thereof made by the Master* in no way meets the fundamental requirement of due process and could not minimize the prejudice which petitioner must have suffered as a result of the Master's *ex parte* excursion into these highly prejudicial files of the United States Attorney.

Amici further argue that, after counsel for petitioner recorded its objection to the manner in which the Master was conducting the proceeding if it were to be deemed to affect any property rights of petitioner, they did not offer in the record, except under stipulation with petitioner's counsel, a single document obtained by the Master without making proper proof thereof through competent witnesses. This begs the issue for petitioner's objection was not and is not confined to what was offered and received in evidence, but relates specifically to that which never became a part of the record although made available to the trier of the facts off the record.

The case of *Market Street Co. v. Comm'n*, 324 U. S. 548, does not support the position of *Amici*. The inconsequential nature of the acts of the Commission complained of is evident from the language of this Court immediately preceding that quoted by *Amici*. In describing the challenged activities of the Commission, this Court said (p. 561-2):

> "Challenged upon the ground that the operating revenues from January to August of 1943 were not in the record, the Commission admitted that these figures were taken from the *appellant's* monthly re-

*We do not mean to infer, as *Amici* intimate (Br. 13-4), that the documents submitted by the Master and the extracts made by him were not altogether accurate and true copies of what they purported to be.

> ports filed with the Commission. It contended that even if it was in error to refer to such reports, the error was harmless, since the record without the figures supported the reasonableness of the six-cent fare and it was therefore immaterial that the Commission used some additional figures. No contention is made here that the information was erroneous or was misunderstood by the Commission, and no contention is made that the Company could have disproved it or explained away its effect for the purpose for which the Commission used it. The most that can be said is that the Commission in making its predictive findings went outside of the record to verify its judgment by reference to actual traffic figures that became available only after the hearings closed. It does not appear that the Company was in any way prejudiced thereby, and it makes no showing that, if a rehearing were held to introduce its own reports, it would gain much by cross-examination, rebuttal, or impeachment of its own auditors or the reports they had filed."

On the contrary, petitioner has always contended that, at a trial in which the requirements of due process of law were observed and the recognized rules of evidence were applied, a conclusion quite different from that reached by the Master would be compelled. Certainly, petitioner is entitled to a trial before a tribunal which has not first been subjected to the fetid atmosphere generated by the Davis-Kaufman-Fox transactions as pictured by the files of the United States Attorney in charge of their prosecution.

Amici contend that petitioner may not now complain of this deprivation of due process because it did not raise the question before the Master, move to set aside the report upon this ground or raise the question before the Court of Appeals on exceptions to the Master's report. Petitioner

promptly urged upon the Master that, if the proceedings conducted by him were to be deemed to be other than an investigation into the affairs of the court, it would stand upon its constitutional right of due process (C. R. p. 166-7; Tr. v. I, p. 123-4, 250). Until it appeared that such was the case, there was no occasion to take further action.

The motion made by *Amici* on July 24, 1945, by which they sought an allowance of costs, expenses and counsel fees, did not change the situation. While petitioner was aware that *Amici* were attempting to obtain, in a proceeding in which the Court of Appeals had no jurisdiction, a judgment against petitioner, it could not have assumed that the Court of Appeals would acquiesce in this attempt. Neither the order of November 26, 1941, nor the order of December 14, 1943 (allowing the Master the sum of $28,495.91 as compensation for his services and the expenses incurred by him), constituted any adjudication of legal liability of petitioner for such expenses. Both these orders left this matter wholly undecided. Petitioner was never apprised, until the entry of the order of December 29, 1944, of the intention of the Court of Appeals to usurp jurisdiction in such a way as to affect adversely petitioner's property rights without due process of law.

POINT III

WHETHER OR NOT THE CIRCUIT COURT OF APPEALS HAD INHERENT JURISDICTION TO VACATE THE JUDGMENT IN THE *ROOT* CASE IS IMMATERIAL (Answering Point III, Br. 36-53).

If the Court of Appeals had done nothing more, in the present proceeding, than set aside its judgments of affirmance in the *Root* case, petitioner would have no legal com-

plaint for, as we have seen, petitioner, at all times, consented to such action on the part of the court.

The quarrel which we have with the arguments advanced in Point III of the brief of *Amici* is with the use to which *Amici* put these arguments in the subsequent points of their brief for the purpose of arriving at the conclusion that, if the court had jurisdiction to set aside its own judgment, it must necessarily likewise have had jurisdiction to make findings binding upon petitioner and affecting its property rights. This argument is carried to its ultimate conclusion in the suggestion by *Amici* (Br. 62) that, as a necessary consequence of the Master's investigation and the court's order, there is now in effect a binding judgment whereby certain clients of *Amici* obtained legal rights against petitioner.

We shall discuss briefly the contentions in Point III of the brief of *Amici* for the purpose of indicating that the ultimate conclusion sought to be drawn from the authorities cited is wholly unsupported thereby.

The principal reliance is placed by *Amici* upon *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U. S. 238, and a series of cases (Br. 39) involving the bribery of former Judge Manton of the Second Circuit.* While we recognize the distinction which *Amici* make between the *Hazel-Atlas* case and the *Manton* cases, nevertheless all of these cases have

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In re 671 Prospect Avenue Holding Corporation, 2 Cir., 105 F. (2d) 960; *Art Metal Works* v. *Abraham & Straus*, 2 Cir., 107 F. (2d) 940; *Art Metal Works, Inc.* v. *Abraham & Straus, Inc.*, 2 Cir., 107 F. (2d) 944; *Electric Auto-Lite Co.* v. *P. & D. Mfg. Co.*, 2 Cir., 109 F. (2d) 566; *General Motors Corp.* v. *Preferred Electric & W. Corp.*, 2 Cir., 109 F. (2d) 615; *Schick Dry Shaver, Inc.* v. *Dictograph Products Co., Inc.*, 44 U. S. P. Q. 622.

two factors in common which are lacking in the case at bar. *First*, in each case the relief granted was at the instance and request of an adversary party in a case or controversy pending before the court. *Second*, in each case the facts claimed to establish the alleged fraud upon the court, which formed the basis for the court's finding of obstruction of justice, were either substantially undisputed by the parties (as in the case of *Hazel-Atlas Co.* v. *Hartford Co.*, *supra*), or had been independently determined (as in the *Manton* cases), at least to the extent of finding a member of the court guilty of misconduct in a legally cognizable trial of a "case" or "controversy" conducted in accordance with recognized rules of evidence and with due regard to due process.*

While this Court held in *Hazel-Atlas Co.* v. *Hartford Co.*, *supra*, that every court has the inherent power to "devitalize" a judgment rendered by the court as a result of imposition upon it, the majority opinion ascribes to such court no power other than the power to vacate its judgments rendered under such conditions that public policy demands their avoidance. To the exercise of such power, petitioner, without conceding the fraud, has consented in the instant proceeding.

In the cases resulting from the criminal conviction of Judge Manton, cited by *Amici* (Br. 39),** the Court of Appeals for the Second Circuit merely ordered reargument on the merits upon the motion of the party which had previously lost the case on the original appeal.

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*Judge Manton had, prior to the reargument of those cases, been found guilty in a criminal trial on an indictment charging him with misconduct in connection with the decision of each of the cases as to which reargument was ordered.

**See cases set forth in footnote p. 18, *supra*.

The quotations from the three state court cases (Br. 39-40)* are dicta, for the courts in these cases refused to exercise the power to vacate judgments. At most, these and the other state court cases cited (Br. 41)** stand for the proposition that where the action of a state court has been induced by fraud or such mistake of fact as to render the judgment a nullity, the court has power to vacate its action.

None of the cases cited by *Amici* do more than ascribe to the court below the power to make the order to which petitioner had consented; *viz.*, to vacate its own judgment of affirmance.

It is true that courts have, in the course of an actual adversary litigation, decided cases upon the basis of public policy not urged by either party, or even in the face of a stipulation by the parties to waive the violation of the public policy in question (Br. 44-5).*** Under similar circumstances, courts have, of their own motion, invoked the doctrine of unclean hands (Br. 45).†

Roseland v. Kreyenhagen, 24 Cal. 52; *Daniel v. Elmer*, 113 N. J. L. 227, 173 Atl. 911; *Underhill v. Jericho*, 66 Vt. 183, 28 Atl. 879.

**Legg v. Overbagh, 4 Wend. 188; *Dave Lowett v. The State of Florida*, 29 Fla. 384, 11 So. 176; *St. Paul Fire & Marine Ins. Co. v. Peck*, 40 Okla. 396, 139 Pac. 117; *Cruger v. McCracken*, 87 Tex. 584, 30 S. W. 537; *McGuinness v. Superior Court*, 196 Cal. 222, 237 Pac. 42; *Taylor v. Jones*, 202 Ala. 18, 79 So. 356; *Craig v. Craig*, 110 Kans. 13, 202 Pac. 594.

***Coppell v. Hall*, 7 Wall. 542; *McMullen v. Hoffman*, 174 U. S. 639; *Sola Electric Co. v. Jefferson Co.*, 317 U. S. 173; *Mercoid Corp. v. Mid-Continent Co.*, 320 U. S. 661.

†*American Ins. Co. v. Lucas*, W. D. Mo., 38 F. Supp. 896, *aff'd* 8 Cir., 129 F. (2d) 143, *cert. den.* 317 U. S. 687; *Ford v. Caspers*, N. D. Ill., 42 F. Supp. 904, *aff'd* 7 Cir., 128 F. (2d) 884; *Memphis Keeley Institute v. Leslie E. Keeley Co.*, 6 Cir., 155 Fed. 964.

Federal courts, it is also true, will inquire into the existence of their own federal jurisdiction over the subject matter of an action either on their own motion or at the suggestion of one who, even though not a nominal party to the alleged controversy, claims that his rights will be affected by an adjudication of a matter over which the federal court lacks jurisdiction.* But in these cases the determination of the court is made in the proceeding in which actual parties are either asserting adverse interests or in which they purport to do so.

In none of the foregoing cases did the court decide or intimate that persons appearing as *Amici Curiae*, strangers to a cause which had become moot, could, in that cause, obtain a binding judgment against one of the former parties thereto in the absence of a case or controversy, in the constitutional sense, between that party and the strangers.

The argument of *Amici* (Br. 47-53) that the Court of Appeals had power to take testimony on the issue of whether one of its own judgments was tainted by fraud has no bearing on the ultimate issue here. The question is not whether the Court of Appeals had power to order an investigation, but what the consequences of that investigation are or should be to petitioner. None of the cases cited by *Amici* in this subdivision of their brief throws any light on this question. Furthermore, as *Amici* concede (Br. 48), this Court in *Hazel-Atlas Co. v. Hartford Co.*, 322 U. S. 238,

Pueblo De Taos v. Archuleta, 10 Cir., 64 F. (2d) 807; *Lord v. Veazie*, 8 How. 251; *Cleveland v. Chamberlain*, 1 Black 419; *American Wood Paper Company v. Heft*, 131 U. S. App. xcvi and 8 Wall. 333; *Gumbel v. Pitkin*, 124 U. S. 131.

specifically left undecided the question of whether the Circuit Court of Appeals had power to decide contested questions of fact such as those here presented.

Each of the other cases*, cited by *Amici* in their Point III (Br. 49-53), relate only, as *Amici* concede, to the inherent power of a court to consider "new evidence pertaining to its appellate jurisdiction" (Br. 52). Those cases do not relate to determinations by the Court of Appeals of factual controversies involving the substantive rights of the parties.

POINT IV

PRIOR TO THE ENTRY OF THE ORDERS OF THE COURT OF APPEALS DATED JUNE 15, 1944, AND DECEMBER 29, 1944, THE *ROOT* CASE HAD BECOME MOOT IN ALL RESPECTS AND ROOT AND UNIVERSAL WERE NO LONGER ADVERSARY PARTIES (Answering Point IV, Br. 53-9).

At the initial hearing before the Court of Appeals, Judge Denison and *Amicus* Von Holst insisted that the *Root* case became moot after the settlement between the parties entered into, as of April 1, 1939. In reply to Judge Haight's statement (C.R. p. 66; Tr. v. I, p. 27) that "the minute Root stops paying royalties, then the decree would become effective if we wanted to make it effective, and the injunction would go against him, so there is still an outstanding decree * * *", *Amicus* von Holst correctly stated the law when he said (C.R. 67; Tr. v. I, p. 27), "If Root should refuse to pay royalties the action would not be for

Kimball v. Kimball, 174 U. S. 158; *Ridge v. Manker*, 8 Cir., 132 Fed. 509; *American Wood Paper Company v. Heft*, 131 U. S. App. xcii; *Dakota County v. Glidden*, 113 U. S. 222; *Kendall v. Excert*, 259 U. S. 139; *Flatfield v. King*, 184 U. S. 162.

the injunction, *the action would be on the contract. Having entered into a license, the decree is completely superseded, the case has become moot.*"

The details of the Root settlement have now been placed before this Court by *Amici* who have annexed to their brief the settlement agreement, dated as of April 1, 1939, and the modification thereof contained in the letter dated January 25, 1939. By the settlement agreement, the accounting provisions of the decree in the *Root* case became inoperative, for Universal released Root from all claims of infringement, and dismissal of the *Root* case was agreed upon. By the letter of January 25, 1939 (Br. App. xii, xiii, paragraph 2 of the settlement agreement (*id.*, vi) was amended to provide that, while the proceedings in the *Root* case were not then to be formally dismissed, neither party should be in a position to invoke any provisions of the decree unless the other consented thereto. To this end it was agreed (*id.*, xiii):

> "Neither Root nor Universal of Delaware shall take any further action or proceeding in such suits of any kind or nature whatsoever without first obtaining the written consent thereto of the other, and all proceedings, other than those referred to in the first sentence of this paragraph, heretofore had in such suits or either of them shall remain unaffected by this Agreement."

These facts were alleged by *Amici* (C.R. p. 70; Tr. v. I, p. 31) in their petition to the Court of Appeals and were admitted by petitioner (C.R. p. 102; Tr. v. I, p. 61).

Thus, prior to the entry of any orders by the Court of Appeals at the suggestion of *Amici*, the only parties to the *Root* case had, by written agreement, dispensed with the ac-

counting provided for by the decree in the *Root* case and had agreed that neither party would take any action other than that specified in the contract between the parties dated as of April 1, 1939, without the consent of the other.

Furthermore, prior to the entry of the orders of June 15, 1944, and December 29, 1944, both patents in the *Root* case had expired (P.B. 6). Thus, in no event, regardless of the consent of the parties, could the injunction provisions of the decrees ever have thereafter become effective. Once the accounting had been disposed of and the injunctions had become inoperative by the settlement agreement of the parties and by the expiration of the patents in question, there was no longer in existence any subject matter upon which the judgment of the Court of Appeals could operate. *St. Pierre* v. *United States*, 319 U.S. 41; *Alejandrino* v. *Quezon*, 271 U.S. 528; *Brockelow* v. *Schwartz*, 261 U.S. 216; *American Book Co.* v. *Kansas*, 193 U.S. 49; *Mills* v. *Green*, 159 U.S. 651; *Spreckles Sugar Co.* v. *Wickard*, App. D.C., 131 F. (2d) 12.

In *Alejandrino* v. *Quezon*, *supra*, this Court said (p. 535-6):

> "The case having become moot as respects its main features, and the other feature being incidental and not in itself a proper subject for determination as now presented, further steps looking to an adjudication of the cause can neither be had here nor in the court below. In this situation we must, following the established practice of this Court, vacate the judgment below and remand the cause with directions to dismiss the petition without costs to either party."

Likewise, in *St. Pierre* v. *United States*, *supra*, this Court dismissed an appeal after it had granted *certiorari*, saying (p. 42-3):

> "We are of opinion that the case is moot because, after petitioner's service of his sentence and its expiration, there was no longer a subject matter on which the judgment of this Court could operate. A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it. *United States* v. *Alaska S.S. Co.*, 253 U.S. 113, 115-16, and cases cited; *United States* v. *Hamburg-American Co.*, 239 U.S. 466, 475-77."

If the federal courts may decide only questions which affect the litigants in an existing "controversy" and must refuse to pass upon controversies between actual adverse parties which, though existing at the time the suit was instituted, had since become moot, certainly they may not pass upon or consider any claim by one who was never a party to a case which has become moot.

The case of *Trade Comm'n* v. *Goodyear Co.*, 304 U.S. 257, referred to by *Amici* (Br. 57-9) is inapposite. There, the only question was whether the Court of Appeals lost its power to review the validity of a cease and desist order issued by the Federal Trade Commission to enjoin an alleged violation of the Clayton Act by reason of the fact that the statute had been amended expressly to disallow the justification upon which the respondent had been relying and respondent had thereupon modified its method of doing business to conform to the ruling of the Commission. The issue raised by the original order was not moot for there was always the possibility that the company would again conduct its business in violation of the statute. Hence, the validity of the cease and desist order was a vital issue for it might become effective at any time as long as the Clayton Act remained law.

The facts in that case were by no means analogous to those in this proceeding. The original order of the Federal Trade Commission had not been rendered inoperative by a settlement between the Commission and the Goodyear Company as in this proceeding; nor had the original order, at the time of the appeal, expired by operation of law, as have the patents, and accordingly the injunction, in this proceeding. The cease and desist order was a fully operative order of the Commission, capable of enforcement.

When the orders complained of here were made, however, no operative decree of any kind was outstanding or in existence.

The only other argument advanced by *Amici* is that Root, in fact, is an adversary party in this proceeding because it expressly refused to become a party hereto (Br. 56-7). A mere statement of this proposition demonstrates its utter lack of merit. This Court will hardly decide a question of the jurisdiction of the Court of Appeals on the mental operations which the *Amici* ascribe to Root.

Thus, even if *Amici* are correct in their assertion (Br. 37) that the last valid act of a duly constituted court was that of Judge Nields allowing the appeal in the *Root* case and that the cause remains where this last valid legal act had placed it, namely, in the Court of Appeals, it is clear that, before the Court of Appeals took the action here complained of, the cause had become moot as between the only parties thereto, and that the Court of Appeals lost jurisdiction to take any further effective action *against* those parties.

POINT V

AMICI CURIAE ARE NOT ADVERSE PARTIES IN THE SENSE IN WHICH THAT TERM IS USED TO DEFINE THE EXISTENCE OF A CASE OR CONTROVERSY UNDER THE CONSTITUTION (Answering Point V, Br. 59-67).

The record demonstrates that *Amici Curiae* at the outset of this investigation refused to appear on behalf of any clients who might be bound by any action which the court below saw fit to take. It is true that originally, in a letter addressed to petitioner, the attorneys who later became *Amici Curiae* stated that they would appear before the Court of Appeals "on behalf of certain companies" against which the *Root* judgment was being asserted as a judicial precedent (C. R. p. 39-40; Tr. v. I, p. 3). At the subsequent hearing before the Court of Appeals it was the position of *Amici* that they did not represent the Root Company which had been the only adverse party in that case but that they represented "some of these other people" as to whom there was a claim that the decree in the *Root* case constituted an adjudication (C. R. p. 46-7; Tr. v. I, p. 9).

But when Judge Biggs inquired whether Judge Denison would not formally "in writing ask for what you want on behalf of your client", Judge Denison replied (C. R. p. 51-2; Tr. v. I, p. 13):

> "The frank answer to Your Honor's question is I don't know just what should be done * * *. As counsel for these other companies against whom the thing is alleged to be an adjudication and which other companies the plaintiff claims were really defendants in this case—as representing those companies we could file a formal application, I suppose."

Judge Biggs then observed that the court had nothing formal before it; Judge Denison admitted that was true and asked for an "intimation" from the court "as to what should be done." Judge Biggs correctly replied (C. R. p. 52; Tr. v. I, p. 14):

> "* * * it would not be proper for us to give anything in the nature of an advisory opinion in the premises. Before we can act we must have something before us, I think, speaking for myself, in writing and in a formal fashion."

Still Judge Denison seemed unwilling to commit his clients to an application for intervention and he continued (*ibid.*):

> "We anticipated Your Honors might think so, and yet we anticipated Your Honors might think the Court had an interest on its own account and should proceed on its own motion * * * *"

With the issue thus narrowed, Judge Biggs put it directly to Judge Denison that the latter and his colleagues represented "certain persons who are directly concerned in the Root Refining case, the two cases to which you have referred." Judge Denison resisted this suggestion, for he said (C. R. p. 52; Tr. v. I, p. 14):

> "* * * we have always denied and we do deny that there was that participation by them in the Root cases that made them really parties, and *we can't come in and say they were parties.*"

At this juncture Judge Biggs stated (C. R. p. 53; Tr. v. I, p. 14):

> "Do you conceive you might have a right to proceed in this matter amicus curiae? What have you to say to that."

This procedure suited Judge Denison to a tee for though he admitted that he had doubts as to the legality of such a proceeding, he said (C. R. p. 53; Tr. v. I, p. 14-5):

> "We had thought of that, and I would say to that, that such a proceeding is broadly within the general thought of proceedings by amicus curiae, but I know of no precedent for it, and such proceedings ordinarily are applications for a reargument of the case, itself, and *that very case is out of existence*, it has been settled. That is the complication there. The problem is a difficult one."

The matter was concluded, however, by Judge Biggs' response, which was (*ibid.*):

> "We think that an application made on behalf of a friend of the Court can be entertained at any time in any matter."

This then was the background against which *Amici Curiae* filed their petition. In that petition they introduced themselves as "*amici curiae*" and alleged (C.R. p. 68; Tr. v. I, p. 29) that they

> "file this petition as *amici curiae* pursuant to the permission of this Court announced in open court in a preliminary and informal hearing, on June 5th, instant."

In the petition it is recited that Universal had filed suits against seven companies, for which the *Amici Curiae* were attorneys, but the petition contains no formal, or even informal, application on behalf of those clients for leave to intervene or otherwise to become parties directly or indirectly to the proceeding. On the contrary, the petition alleges (C.R. p. 69; Tr. v. I, p. 30):

> "The jurisdiction of this Court rests upon the inherent power of the Court at any time to examine into the suggested existence of fraud and corruption affecting and tainting any former action of such Court."

The petition was signed not on behalf of any client but by Messrs. Denison, Thiess and von Holst, as *Amici Curiae*.

All papers in the proceedings below were signed by them "as *Amici Curiae*". During all the hearings before the Master, in the briefs submitted to him, during the hearing before the Court of Appeals, and in briefs submitted to it, they appeared solely and exclusively "as *Amici Curiae*". Even after the Court of Appeals had approved the Master's report and directed the *Root* judgments to be vacated, *Amici*, in their petition for the compensation and expenses now the subject of this appeal, continued to describe themselves exclusively "as *Amici Curiae*". Only when the petition for a writ of *certiorari* was filed by petitioner herein and one of the points emphasized was the absence of a "case" or "controversy" under the Constitution did *Amici*, having succeeded in bringing the investigation thus far to a favorable conclusion, *for the first time* sign themselves "*pro se* and on behalf of" certain corporate clients.

Since that time, they have piously adhered to the practice and now have taken the astounding position that their clients would have been bound by any finding adverse to them by the Master or by the Court of Appeals and, as a necessary inference, would have been subject to pay all of the costs and expenses of the proceedings including those of petitioner.

The advantages of this procedure to the clients of *Amici* are obvious. Not bound by any rules of evidence or

hampered by burdens of proof or presumptions of innocence and fair dealing, *Amici* now contend that they have, in effect, obtained a judgment on behalf of their clients against petitioner branding the petitioner guilty of actionable fraud. The first consequence of this claim is the order of December 29, 1944, in which *Amici* have obtained, as they now state, on behalf of their private clients, a money judgment reimbursing these private clients for expenses and lawyers' fees paid out in connection with the clients' endeavors to obtain, through the investigation, actionable claims against petitioner.

In order to support this position, *Amici* urge that each of the seven companies would certainly have been bound by the decision of the Master and the court below and estopped to assert the fraud in each of their several cases if the result of the investigation had been in favor of petitioner (Br. 62). This proposition is entirely contrary to the decided cases in this and other federal courts. It has been repeatedly held that *amici curiae* are not bound by a judgment resulting in a case in which they have been given permission to appear as friends of the court.* Thus, even if

* *Stryker* v. *Goodnow*, 123 U. S. 527, 540; *Bigelow* v. *Old Dominion Copper Co.*, 225 U. S. 111, 126; *Brown-Crummer Inv. Co.* v. *Paulter*, 10 Cir., 70 F. (2d) 184, 186; *City of Stuller* v. *H. C. Speer & Sons Co.*, 10 Cir., 62 F. (2d) 544, 548; *Garland Co.* v. *Filmer*, N. D. Cal., 1 F. Supp. 8, 13. See *Brown* v. *Wright*, 4 Cir., 137 F. (2d) 484, 487. The two cases cited by *Amici* are not in point. *Souffront* v. *Compagnie Des Sucreries*, 217 U. S. 475, merely holds that the real party in interest is bound by the outcome of a litigation brought by a nominee. *Drummond* v. *United States*, 324 U. S. 316 stands for the undisputed proposition that where parties in fact conduct a litigation they may be bound by the judgment under the doctrine of *res adjudicata*, although they were not formal parties thereto. The status of *Amici* as friends of the court not bound by the outcome of litigations is not changed by these decisions.

the attorneys, who themselves are *Amici* in this case, h
appeared, not on behalf of themselves but had reques
permission to appear on behalf of their clients as *am*
curiae; no judgment binding upon their clients could ha
been entered in this proceeding. *A fortiori*, where the
torneys themselves become *amici curiae* without forma
appearing or behalf of the companies which they n
claim to represent, it is inconceivable that any judgm
binding upon their clients could have been obtained by pe
tioner. Thus, not only are *Amici* seeking for their o
clients the advantages to be derived from a judicial
vestigation unhampered by the usual requirements of d
process of law and recognized procedure, but throughc
they have been able to place their clients in the happy po
tion where they had nothing to lose in the event of an a
verse result and everything to gain if *Amici* were success
in their stratagem.

The cases cited by *Amici* (Br. 61-2) in support
their argument that their clients have become parties to t
Root case in no way support such contention. In *Freem*
v. *Howe et al.*, 65 U. S. 450, and *Compton* v. *Jesup, et*
6 Cir., 68 Fed. 263, non-parties filed a bill of review a
a petition to intervene. In each case they were accord
this right because they asserted a property right in the pa
ticular property over which the court was exercising jur
diction. In each case there concededly existed a "case"
"controversy" between the original adverse parties.
analogy, therefore, can be drawn between those cases a
the instant proceeding.

The argument of *Amici* that their clients had a great
interest in the *Root* case than had the intervenor in *Am*
ican Wood Paper Company v. *Heft*, 131 U. S. App. xcii,

unsound. That case does no more than adhere to the well-established principle that anyone, party or non-party, may suggest to the court the non-existence of its jurisdiction.

Walling v. *Reuter Co.*, 321 U. S. 671 (Br. 63), does not support the argument which *Amici* base upon it. In that case this Court found the initial and continued existence of adverse parties. Although the respondent-corporation had been dissolved, the Court found that the decree by its terms would still run against those identified and associated with the respondent including its legal successors and therefore concluded that it still had jurisdiction over the subject matter of the suit.

In both *Morgan* v. *United States*, 304 U.S. 1 and *Re Summers*, U.S. , 89 L. Ed. Ad. Op. 1304, cited by *Amici* (Br. 64-5) in support of their argument that the "case" or "controversy" requirement is not subject to rigid construction, there was an actual controversy between adverse parties. In each of the cases the adverse parties had a distinct interest in the subject matter of the litigation. This element is, of course, entirely lacking in the instant proceeding where *Amici* by their own statement have never had any legal interest in the moot controversy between Root and petitioner (C. R. p. 52; Tr. v. I, p. 14).

The state court cases* cited by *Amici* (Br. 65-7) are analogous to that class of cases in which persons having an interest in property which is the subject matter of a litigation are allowed to intervene therein in order to protect their interests. In any event cases in state courts can have no bearing on the interpretation of the constitutional re-

Craig v. *Craig*, 110 Kans. 13, 202 Pac. 594; *Craig* v. *Craig*, 112 Kans. 472, 212 Pac. 72; *Trumpler* v. *Trumpler*, 123 Cal. 248, 55 Pac. 1008.

quirement that federal courts have jurisdiction only in "cases" or "controversies".

POINT VI

THE CONTENTION OF *AMICI CURIAE* THAT THE COURT OF APPEALS HAD JURISDICTION TO ASSESS FEES AND EXPENSES AGAINST PETITIONER IS WITHOUT MERIT (Answering Point VI, Br. 67-71).

Amici have wholly failed to answer the argument made by petitioner in its main brief (P. B., 46-52). They base their argument that the Court of Appeals had the power to award costs against petitioner upon *Ex parte Peterson*, 253 U.S. 300; *Sprague* v. *Ticonic Bank*, 307 U.S. 161 and *R.F.C.* v. *Menihan Corp.*, 312 U.S. 81. These cases, however, are clearly inapposite.

Ex parte Peterson, 253 U.S. 300, involved merely the allowance of costs to an auditor who, under the circumstances, was no more than an instrument of the court appointed for the purpose of simplifying the issues for the jury. The auditor had been appointed in a pending case, between adverse litigants, pursuant to a practice recognized in the courts of the state within which the federal district court making the appointment was sitting. The allowance of costs was made, in the absence of any applicable federal statute or prohibition, on the basis of decisions authorizing the district court to follow the state practice. In the case at bar, as we have shown, not only is there no case or controversy, but the federal statutes and the court rules adopted thereunder, as well as the Pennsylvania practice, forbid the allowance of the type of costs made by the court below (P.B. 46-52).

The reliance of *Amici Curiae* on the *Peterson* case demonstrates the inconsistency of their position. Their primary contention appears to be that they or their clients were parties to the proceeding for the purpose of creating a case or controversy, whereas their secondary position, namely, that they are entitled to compensation under the doctrine of the *Peterson* case, is based upon a contention that they were an instrumentality of the court and not an adverse party.

Amici, in their discussion of the *Sprague* case (Br. 69-70), recognize that in that case "the litigation in effect created a fund in which other parties were interested." This, of course, brings the *Sprague* case within the "fund case" exception to the general rule that counsel fees and expenses are never recoverable against a party (see P.B. 49-50).

Amici Curiae have misconstrued the decision in *R. F. C. v. Menihan Corp.*, 312 U.S. 81 (Br. 70). The sole issue on that appeal was whether the Reconstruction Finance Corporation was clothed with immunity from the burden of costs under Rule 54(d) of the Rules of Civil Procedure. This Court held that it was not and that Rule 54 (d) did not divest the District Court of its discretion to grant costs and additional allowances if the facts presented a proper case. No opinion was expressed as to whether a proper case existed for the exercise of such discretion. Upon a subsequent application for normal costs and an extra allowance, the District Court, after noting that this Court had not expressed an opinion as to how the District Court's discretion should be exercised, determined that the case did not call for the exercise of its discretion in favor of a grant of extra allowances. *Reconstruction Finance Corp. v. J. G. Menihan Corp.*, W. D. N. Y., 42 F. Supp. 244.

Thus, even on the assumption that the Court of Appeals had jurisdiction in the present matter, both reason and the authorities prohibit the direction by the Court of Appeals of payment by petitioner of $154,606.57 as compensation to and expenses of *Amici Curiae*.

CONCLUSION

THE ORDER OF THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, ENTERED ON DECEMBER 29, 1944, SHOULD BE VACATED AND THE PROCEEDINGS DISMISSED.

Respectfully submitted,

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